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89-1128

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1989

HARRY E. FLEISCHHAUER, et al.,
Petitioners

v.

C. ELVIN FELTNER, JR., et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
TO
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Harry E. Fleischhauer, et al., the petitioners herein, pray that a writ of certiorari issue to review the judgment of the Sixth Circuit Court of Appeals entered in the above-entitled case on June 27, 1989 and the supplemental opinion issued on reconsideration of August 31, 1989.

Questions Presented

What measure of damages best serves the policies expressed by Congress in the Racketeer Influenced and Corrupt Organization Act of 1970, 18 U.S.C. 1961 et seq.?

List of all parties

Natividad Aumentado, Ken W. Chambers, Gordon M. Earl, Harry E. Fleischhauer, Bruce I. Forrester, Donald Forrester, Kathleen D. Forrester, Robert P. Gill, Dennis M. Harrington, Roger Houston,Charles E. Judd, C. T. Lee, Robert & Ona Mournighan, Charles Mueller, James Ralph,

REF, Joseph Reisinger, Louis B. Updegrove,Daniel E. & Carol Ann Wright, Petitioners and C. Elvin Feltner, Jr. Robert J. Levine, Palm Beach Properties, Inc., a/k/a Palm Beach Films, Inc, Metropolitan Properties, Inc., a/k/a Metropolitan Films, Inc., and Krypton Corporation, Respondents.

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JURISDICTION

The opinion of the Court of Appeals was entered on June 27, 1989 and the supplemental opinion was issued on August 31, 1989. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED.

Amendment 7, Constitution of the United States:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by the jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

18 U.S.C. 1964, Civil Remedies:

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter (18 U.S.C. 1962) may sue therefor in any appropriate United States district court and shall recover three fold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Petitioners' claim for relief arises under the Racketeer Influenced and Corrupt Organization Act of 1970, 18 U.S.C. 1961, et seq. Petitioners sought to recover three-fold the damages they sustained as a result of the respondents' conduct, plus costs, interest, and reasonable attorney's fees.. The district court's jurisdiction was invoked under 28 U.S.C. 1331, 1332; 18 U.S.C. 1964 (a) and 1964 (c).

The jury returned a verdict for each of 19 petitioners against five respondents. Petitioners, none of whom had previously engaged in the motion picture distribution business, asserted RICO claims against respondents because respondents, by use of the United States mail and wire, sold petitioners non-theatrical rights for distribution of copies of motion pictures and television episodes and thereafter denied them access to the original materials from which the copies were to be made. Although respondents retained the right of distribution to motion picture theaters, they had contracted to allow petitioners the right of access

to the original materials in order to produce the copies to be used in petitioners' distribution businesses.

At trial no objection was made to the trial court's instruction that:

> Damages which are speculative cannot be recovered; however, when damages have resulted from wrongful acts, they may be recovered by the injured party, even though they are uncertain in amount, or even though the injured party cannot show with certainty the exact amount of damages incurred. It is enough if the evidence shows the extent of the damage as a matter of just and reasonable inference, although the result may be only approximate. * * *. The damages recoverable for a violation of RICO is that amount reasonably necessary to compensate a plaintiff for injury to business or property, proximately caused by violation of the RICO statute. You may not treble that amount, nor may you include any sum for costs of suit or for reasonable attorneys' fees * * *.

A jury verdict by questionaire found the five respondents had violated civil RICO and awarded damages accordingly in line with the above instructions.

On appeal, respondents urged the Court of Appeals to limit the measure of damages recoverable under RICO to "out-of-pocket losses." The Court of Appeals substituted its

judgment for that of the jury in rendering its verdict by reducing the jury verdict from $1,317,117.00 to $215,220.00. The Court of Appeals specifically held that petitioners were not entitled to any expectancy damages. In response to petitioners' petition for rehearing, the Court increased the judgment by $3,520.00 out of pocket shown by the transcript of testimony at trial and remanded for determination by the trial court the amount of down payments of two petitioners.

The Court of Appeals as justification said:

> As a general rule RICO plaintiffs are entitled only to damages to business or property proximately caused by the predicate acts. See Haroco, 473 U.S. at 609. Applying this rule to the circumstances of this case we believe that plaintiffs' damages should be limited to the amounts actually invested.

In the supplemental opinion the court elaborated by stating:

> ***Under the evidence introduced at that trial, we concluded that the plaintiffs were entitled, for the most part, to recover the "amounts actually invested," subject to trebling.***

ARGUMENT AMPLIFYING REASONS RELIED UPON FOR GRANTING WRIT

This petition epitomizes the problem in determining damages in RICO actions, an important question of federal law which has not been, but should be, settled by this Court. Congress gave a person injured in his business or property the right to sue, however, failed to define the measure of damages to be applied.

This Petition asks the Court to decide what measure of damages best serves the policies expressed by Congress in the federal RICO statutes.

In the case at bar, the Court of Appeals appears to have adopted and integrated two theories as to the measure of damages, without delineating them as such in its opinions. The first theory, the court, in essence, adopted the "out of pocket" rule used in federal common law fraud cases, **without providing interest**, which was part of that rule. Smith v. Bolles 132 U.S. 279 (1889). As the second theory employed in the integration of the damage rule, the Court of Appeals appears to have applied the "New Business Rule"

used in some Clayton Act cases, thereby depriving petitioners of their reasonably expected profits and interest in the RICO violations. Olivetti Corp. v. Ames Business Systems, Inc., 81 NC App 1, 344 SE 2d 82, stay gr. 317 NC 336, 346 SE 2d 150, review gr. 317 NC 305, 347 SE 2d 438, and affirmed in part and reversed in part on other grounds, 319 NC 534, 356 SE 2d 578, rehearing denied 320 NC 639, 360 SE 2d 92. The "New Business Rule" has been criticized, and there is an increasing trend to create exceptions or to recognize that its rationale is not persuasive. Petitioners urge that the application of the "New Business Rule" is irrational when applied to RICO victims who were specifically induced to part with their money to purchase a business opportunity, the express purpose of which was to produce future profits from the "New Business".

The Court of Appeals solution as to damages in this case was to substitute its opinion as to what the damages ought to be in place of the jury's award by modifying the amount to reflect only the dollar amount of what petitioners had paid respondents, without interest. Petitioners submit that the

action of the Court of Appeals was inappropriate for the reasons which follow.

As an inducement to purchase the non-theatrical rights and to exploit the business opportunity of distributing the non-theatrical rights to the motion pictures and television episodes, respondents provided a bound document approximately one-half inch thick, referred to as a "Full Kit". This "Full Kit" contained over 100 pages and outlined the business plan and opportunity. It contained profit projections, legal tax opinions, contracts and other subsidiary documents necessary to consummate the alleged sale of the non-theatrical rights in the motion pictures and television episodes. It contained a list of recommended motion picture distributors and provided contracts to engage the distributors. Most importantly, the "Full Kit" delineated the reasonably anticipated future profits which flowed from the business of distributing the non-theatrical rights when one purchased the rights and entered into the various contracts provided.

Based upon this and other evidence the jury determined the amount of the damage to each petitioner which flowed from the wrongful and unlawful RICO conspiracy. Petitioners proved that the RICO injury deprived them of the purchase price and the reasonably anticipated future profits which were lost as a result of the RICO violations. The "Full Kit" stressed the ability to derive future earnings from the distribution of the non-theatrical rights and even provided a plan which would pay the balance due on the purchase price, the costs of distribution and provide a yearly profit for petitioners out of earnings.

Necessarily, the jury's verdict included recovery of expectancy of profits and other losses which directly flowed from the wrongful acts of the RICO defendants.

Absent statutory guidelines as to the measure of damages, petitioners urge the Court to decide that the method by which a jury may award damages in a RICO action is analogous to the Clayton Act rule set down by this Court in Zenith Radio Corp. v. Hazeltine Research, 395 U.S.

100, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969) wherein this Court stated:

> * * * The Court has repeatedly held that in the absence of the more precise proof, the factfinder may conclude as a matter of just and reasonable inference from the proof of the defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiff. Bigelow v. RKO Radio Pictures, Inc., *supra*, 327 U.S., at 264, 90 L. Ed. at 660, 66 S. Ct. at 579. See also Eastman Kodak Co. v. Southern Photo Materials Co. 273 U.S. 359, 377-379, 71 L. Ed. 684, 690, 691, 47 S. Ct. 400 (1927); Story Parchment Co. v. Paterson Parchment Paper Co. 282 U.S. 555, 561-566, 75 L. Ed. 544, 547-550, 51 S. Ct. 248 (1931). * * * Although the factfinder is not entitled to base a judgment on speculation or guess work, the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, juries are allowed to act upon probable and inferential as well as direct and positive proof. Story Parchment Co. v. Patterson Parchment Paper Co., supra, 561-4 (75 L. Ed. 547-549); Eastman Kodak Co. v. Southern Photo Materials Co., supra, 377-9, (71 L. Ed. 690, 691). **Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery by rendering the measure of damages uncertain. Failure to apply it would mean that the more greivous the wrong done, the less likelihood there would be of a recovery."** 237 U.S., at 264-265, 90 L. Ed. 660. Here, Zenith was denied a valuable license and submitted testimony that without the license it had encountered distribution difficulties which prevented its securing a share of the market comparable to that which it enjoyed in the United States, and which its business proficiency demonstrated in the United

States, dictated it should have obtained in Canada. (Emphasis ours)

In the instant case, petitioners were denied access to their property and submitted testimony that, without access, despite the fact that petitioners had employed an experienced, qualified and competent distributor of proven ability, they were prevented from doing business because they had nothing to distribute.

The case at bar illustrates both the analogy to the Clayton Act situation and an inherent difference arising fron the nature of RICO. In Zenith Radio Corp. v. Hazeltine Research, supra, an existing business was damaged by a conspiracy in restraint of trade. In the case at bar, as part of respondents scheme, petitioners' businesses were stopped before they could start because of RICO violations.

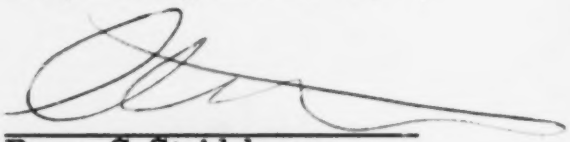
The cause and effect of the rule of damages adopted by the Court of Appeals can be viewed as counter-productive as to the intentions for the creation of civil RICO. In this instance, the wrongdoers are placed in a position by the Court of Appeals to make a profit from their RICO

violations. The respondents have been in possession of the property (money and film rights) of the petitioners since December of 1980 or longer. During that period of time, the respondents could have made a profit by simply placing the monies received of the petitioners in a savings account, more than the consequence of their having to pay damages of the "amount paid out or invested" trebled. This measure of damages is totally contrary to those enumerated in the statute regarding criminal RICO, which, in part, is to deprive, through fortfeiture, the taking of any profit. The Court of Appeals has further victimized the petitioners in its measure of damages, by allowing the respondents to profit, but denying the petitioners their right to expected vested value in their business and profits.

CONCLUSION

This petition for a writ of certiorari should be granted because a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court; the decision of the court of appeals as to the measure of damages in RICO actions and has endless ramifications in actions currently pending and yet to be filed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Roger C. Stridsberg, a member of the Bar of the Supreme Court of the United States and counsel of record for petitioners herein, hereby certify that on the 15th day of January, 1990, pursuant to Rule 29.3, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on each of the parties herein as follows:

On C. Elvin Feltner, Jr., Palm Beach Properties, Inc., and Metropolitan Properties, Inc. by depositing such copies in the United States Post Office, in Cincinnati, Hamilton County, Ohio, with first class postage prepaid, properly addressed to the post office address of Richard Boydston, Esq., counsel of record for C. Elvin Feltner, Jr., Palm Beach Properties, Inc., and Metropolitan Properties, Inc.. Strauss & Troy, 2100 Central Trust Center, 201 East Fifth Street, Cincinnati, Ohio 45202-4186; and,

On Robert J. Levine, by depositing such copies in the United States Post Office, in Cincinnati, Hamilton County, Ohio, with first class postage prepaid, properly addressed to

the post office address of Robert J. Levine, Esq., 304 Dawson Lane, Jericho, New York 11753.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CASE NO. 87-4060

HARRY E. FLEISCHHAUER, et al.

Plaintiff-Appellees,

v.

C. ELVIN FELTNER, JR., et al.,

Defendants-Appellants.

ON APPEAL from the United States District Court for the Southern District of Ohio, Western Division

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Decided and Filed June 27, 1989

Before: KRUPANSKY and WELLFORD, Circuit Judges; and JOINER,* Senior District Judge.

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*The Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

WELLFORD, Circuit Judge. This appeal follows a jury verdict awarding appellees treble damages of $3,951,351.00 for RICO violations associated with appellees' participation in appellants' film investment program. Appellants raise several issues regarding liability and damages. We affirm the liability determination, except as to Krypton, and reverse, in part, the damages award.

I. FACTS

This controversy arose when 19 separate plaintiffs purchased non-theatrical rights to the distribution of 23 full length feature motion picture and television episodes fron the five defendants. [1]

The rights in the films the plaintiffs purchased included the right to distribute the films on television and cable

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[1]The defendants are: C. Elvin Feltner, Jr., Robert J. Levine, Palm Beach Properties, Inc. a/k/a Palm Beach Films, Inc. (Palm Beach), Metropolitan Properties, Inc., a/k/a Metropolitan Films, Inc. (Metropolitan), and Krypton Corporation (Krypton).

television, by video cassette, and for other viewing except in movie theaters. Most plaintiffs entered into contracts with either Metropolitan or Palm Beach in November or December of 1980, but Donald Forrester entered into a contract with Metropolitan in early 1981.

The five defendants all allegedly participated in the marketing and sale of the film rights to the plaintiffs. Metropolitan and Palm Beach sold to the plaintiffs the distribution rights to the films. Krypton was not incorporated until September 28, 1982, but it is alleged, nonetheless, that Krypton was actively engaged in the film marketing plan as early as November of 1980. Feltner was the sole shareholder, a director and the chairman of the three defendant corporations. Mr. Levine, an attorney, was an officer of each defendant corporation.

In October, 1980, Levine mailed a packet of information to Fleischhauer, an investment advisor, on availability of the films in question. Levine followed up the mailing by telephoning Fleischhauer. As a result of that conversation, Levine mailed Fleischhauer a "full kit" detailing the terms

of the film program offered. Fleischhauer contacted Donald Forrester, his accountant and a certified professional accountant, to review the full kit. Levine then traveled to Cincinnati in November to discuss the investment with Fleischhauer and Donald Forrester and afterward Fleischhauer checked references Levine furnished.

In the agreement reached at the meeting, Fleischhauer was to receive a 10% commission on each sale Metropolitan made and a 20% commission on each sale Palm Beach made. Fleischhauer agreed to share the commissions with Donald Forrester. Fleischhauer received $56,000 in commissions on sales of the film rights to the plaintiffs. At oral argument, appellees noted that no evidence was admitted indicating that Fleischhauer paid any commissions to Donald Forrester. All other plaintiffs were initially advised of the investment opportunity by Fleischhauer or by Donald Forrester.

Most plaintiffs received their information either directly or indirectly (through Fleischhauer or Forrester) from the full investment kit, in which a written explanation of the prospective investment was set forth. This kit is over 100

pages long and contains material relating to the tax benefits of the transaction, a list of film titles available, a purchase and sale agreement, copies of financing options, a 64 page legal opinion and miscellaneous questions, answers and examples.

The transaction was described by the seller defendants as a purchase for both income and tax advantage purposes to be financed through an initial "down payment," the balance expected to be paid with interest from revenues generated by the buyers' distribution activity over a ten year period. The purchase prices and down payments varied depending upon the nature of the film.[2] The standard form contract included a provision for making the down payment in installments. Buyer plaintiffs were to take full responsibility for arranging the distribution of the film. Sellers represented that plaintiffs could enter into further distribution contracts providing that the distributor would

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[2]The required down payment was, generally, approximately five percent higher in a sale by Palm Beach than one offered by Metropolitan.

retain 40% of the gross revenues without any reimbursement of expenses.

The kit issued by defendants explained that a plaintiff could obtain a refinancing agreement with an unaffiliated entity, Southwest Capital Corporation, in the event revenues were not sufficient to pay the purchase price over the ten year period. It also addressed the tax implications of the purchase and discussed *KIRO, Inc. v Commissioner*, 51 T.C. 155 (1968). (Under that decision, the owner of film distribution rights was permitted under certain circumstances to deduct 100% of the purchase price of the films over 7 years at a rate of 60% in the first year, 15% in the second year, and 5% for each of the following five years.)

Through the kit materials furnished, defendants also advised interested parties that there was a significant chance that the purchaser would be audited by the Internal Revenue Service because of earlier abuses regarding production and distribution of motion pictures. Defendants offered to convert liability on the purchase contract from full

recourse to nonrecourse in the event the IRS disallowed anticipated deductions and write-offs on the investment. A condition of that conversion option was that the purchaser plaintiff must contest the IRS determination.

A list of numerous distributors was provided to Fleischhauer, but it was expected that those films which were episodes in a series would be handled by a single distributor. In the event all episodes in a series were not sold, the seller agreed to make the unsold episodes available to the purchaser's distributor.

A number of the plaintiffs testified that they never spoke with either Feltner or Levine prior to purchasing their film and that they relied solely on the advice of Fleischhauer. Plaintiff Ralph testified that he spoke to neither Feltner nor Levine before purchasing his film but relied solely on the advice of Fleischhauer and Donald Forrester and his own review of the kit. Several plaintiffs testified that they spoke with Levine before signing his contract on limited subjects such as selection of film or the distribution process. Only four plaintiffs, including Forresters and Fleischhauer, spoke with Feltner before purchasing their film rights.

There was no evidence about the identity of the particular seller in the case of four other plaintiff.[3] Six plaintiffs purchased their films from Metropolitan; the remaining plaintiffs purchased their films from Palm Beach.

All plaintiffs allegedly entered initially into distribution contracts with Joseph Green Film Enterprises, Inc. (Green) which was not named as a defendant. Access letters were provided to Green for the benefit of all plaintiffs in order that Green could obtain access to the films, but Green failed to secure distribution of any of the films because many unauthorized copies of the films were available to those who wished to use them and the copies plaintiffs purchased were of poor quality. Testimony was offered that Levine knew, before the films were sold, that the films were not marketable either because they were unauthorized copies or because unauthorized copies were readily available.

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[3]There were also six plaintiffs as to which there was no contract indentified, offered, or admitted into evidence.

Because they were unsuccessful in efforts to distribute or lease the films, several plaintiffs who had made only partial down payments withheld the balances within a few months after execution of their contracts. Others testified that although they obtained options with Southwest Capital Corporation to extend the ten year period in which the contract balance was to be paid, they subsequently failed to pay the required annual fee to preserve that option.

As a result of their failure and resulting frustration in effecting distribution of their films, plaintiffs were solicited by Bruce Forrester and Donald Forrester to pursue this litigation against defendants seeking compensatory and punitive damages and attorney's fees, based on RICO charges and Ohio common law fraud.

Appellants have submitted a chart, which is attached as an appendix, compiled from trial testimony and exhibits, setting out pertinent data concerning each plaintiff, the purchase price involved, the actual payment made to defendant or defendants, whether that plaintiff who claimed tax write-offs was audited, a purported outline of tax treatment, and damage awards rendered (before trebling of

the award under RICO). Appellees have not challenged appellants' computations. In all, fourteen of the nineteen investors were audited by the Internal Revenue Service, which disallowed very substantial deductions claimed. The bulk of damages awarded to plaintiffs was against defendant Feltner. Donald Forrester, as an extreme example, paid nothing on his investment of $162,500, yet claimed $97,500 worth of tax benefits which have been challenged by the IRS. Donald Forrester was awarded, nonetheless, almost $171,500 in damages subject to trebling. Fleischhauer invested some $138,500, paid only $200 and claimed $40,000 in tax benefits, which was challenged by IRS. He was awarded $56,754 in damages (apart from commissions and trebling). Total damages awarded all plaintiffs, before trebling, against the defendants was $1,317,117.00.

Of the nineteen investments made, fourteen of the nineteen investors were audited by the Internal Revenue Service for deductions taken relating to their film purchase.

The first RICO claim by each plaintiff alleges, in part, as follows:

Defendants "... John Does and Jane Does, enterprises engaged in and whose activities affect interstate commerce, did conduct and participate in their affairs through a 'pattern of racketeering activity,' as that term is defined in 18 U.S.C. §§ 1961(1) and 1961(5), and in so doing, violated 18 U.S.C. § 1962" thereby entering plaintiffs and their business [and, further, that].

"... defendants, acting as a group and constituting an enterprise as that term is definded in 18 U.S.C. § 1961(4)" devised a scheme to defraud each plaintiff "in a manner prohibited by 18 U.S.C. §§ 1341 and 1343 and thereby violated 18 U.S.C. § 1962."

The second RICO claim by each plaintiff alleges, in part, that:

"for purpose of executing the aforesaid scheme" Messrs. Feltner and Levine "utilized, the United States Mail facilities in interstate commerce on two or more occasions and thereby violated 18 U.S.C. §§ 1341, 1343, and 1962" [and further, that]

> Messrs. Feltner and Levine "did conduct and participate in the affairs of" defendants, "enterprises engaged in and whose activities affect interstate commerce, through 'pattern of racketeering activity,' as that term is defined in 18 U.S.C. § 1961(1) and § 1961(5), through a scheme, artifice, and device to defraud" and, in so doing, "injured plaintiffs in their business and property."

Defendants requested the district court to instruct the jury that the burden of proof for plaintiffs on their RICO claims as in the case of the state law fraud claims, was by clear and convincing evidence. The district court instead adopted a preponderance of the evidence standard. Defendants also moved for a directed verdict, both at the conclusion of plaintiffs' case and of defendants' case. A primary basis for the motion, on the part of Krypton, was that it had not been formed as a corporate entity until well after the sales to plaintiffs.

In closing argument to the jury, plaintiffs contended that the damages they sustained were the actual total purchase

price of the films acquired, plus the down payments actually paid, plus the penalty and interest they incurred in tax charges and "everything they had to go through and are still going through" as a result of the alleged wrongdoing by defendants.

Submitted to the jury with the instructions were ten separate interrogatories, five on the RICO claims, five on the common law fraud claims, and two separate damages charts, one for the RICO claims and the other for common law fraud claims.

The jury answered these interrogatories by indicating that all defendants had violated the RICO statute and had committed both mail fraud and wire fraud (except that there was no wire fraud on the part of Krypton), and that all plaintiffs had been affected by either such mail fraud or wire fraud. The jury at the same time did not find any defendant had committed fraud under Ohio law.

The district court then entered an order trebling the damages in favor of each plaintiff against each defendant to produce a total money judgment in the amount of

$3,951,351. It is unclear how damages were calculated and what basis existed for the differentiation between the defendants in damages allocation. Defendants filed post-trial motions for directed verdict, judgment notwithstanding the verdict and for a new trial. The district court denied all of defendants' post-trial motions and this appeal ensued.

II. LIABILITY

Under 18 U.S.C. § 1962(c), it is unlawful:

> for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity....

The terms "enterprise," "person," "racketeering activity," and "pattern of racketeering activity" are defined in 18 U.S.C. § 1961, as follows:

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of [18 U.S.C.]: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . .

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred withing ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity, ...

A private right to action is provided for a person injured in his business or property by reason of a RICO violation. 18 U.S.C. § 1964(c).

On appeal appellants raise several questions regarding civil RICO liability: (1) did the judge instruct the jury properly on the evidentiary standard; (2) have plaintiffs differentiated between liable "persons" and the RICO "enterprise"; (3) have plaintiffs proven the existence of a RICO "pattern"; and (4) is Krypton, an unformed corporation, a "person" liable for RICO violations.

A. *Burden of Proof*

Appellants claim that the district court erred in instructing the jury that plaintiff must prove each of the predicate wire and mail fraud violations by a preponderance of the evidence. They contend that because this RICO action is premised upon federal wire and mail fraud--criminal offenses that have no corresponding private rights of action--a higher standard of proof is required. They also contend that the court should have adopted the burden of proof applicable to state law fraud actions. This is essentially the

position advocated in a dissent to a RICO decision in the Ninth Circuit. *See Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 532-35 (9th Cir. 1987)(Boochever, J., dissenting).

We reject these contentions; a preponderance standard is the appropriate standard of proof. The Supreme Court has hinted, but not held, that this is the appropriate evidentiary standard. The Court stated: "We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under § 1964(c). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985). Other circuits specifically addressing this issue have followed the Court's suggestion. *See Liquid Air Corp. v. Rogers*, 834 F. 2d 1297, 1302 (7th Cir. 1987); *Wilcox*, 815 F. 2d at 531; *Cullen v. Margiotta*, 811 F. 2d 698, 731 (2d Cir.), *cert. denied*, 107 S. Ct. 3266 (1987); *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F. 2d 475, 480-81 (5th Cir. 1986); *United States v. Local 560, Int'l Brotherhood of Teamsters*, 780 F. 2d 267, 279-80 n.12 (3rd Cir. 1985), *cert.*

denied, 476 U.S. 1140 (1986). Appellants' contentions were raised, discussed and rejected in *Liquid Air,* and we are in agreement. 834 F. 2d at 1301-03.

B. Distinguishing RICO "Persons" from the RICO "Enterprise"

Appellants argue that plaintiffs' pleadings do not adequately describe the "enterprise" and the "persons" participating in the "enterprise." Only "persons" can be held liable for RICO violations; the "enterprise" itself is not liable. 18 U.S.C. § 1962(c). *See, e.g., Yellow Bus Lines v. Local Union 639,* 839 F. 2d 782 (D.C. Cir.), *cert. denied,* 109 S. Ct. 309, (1988). The "person" and the "enterprise" must be separate and different entities. *See, e.g., United States v. Feldman,* 853 F. 2d 648, 656 (9th Cir. 1988), *cert. denied,* 109 S. Ct. 1164 (1989). This distinction must be described in the pleadings. *Bennett v. Berg,* 685 F. 2d 1053, 1061 (8th Cir. 1982), *cert. denied,* 464 U.S. 1008 (1983).

The pleadings in this case satisfactorily describe and distinguish the "persons" and the "enterprise." The statute defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union

or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). We believe the pleadings adequately state that each of the five defendants was a "person" and together they formed a racketeering "enterprise." An enterprise must be merely "an ongoing organization, formal or informal." *United States v. Turkette*, 452 U.S. 576, 583 (1981). In this case, Metropolitan, Palm Beach, Krypton, Levine and Feltner comprised such a group. *See also Feldman*, 853 F. 2d at 655-56 (individuals and corporations can associate to create RICO "enterprise").

Appellant contends that the "enterprise" alleged and proven was not sufficiently distinct from the "person"--in other words, because Feltner owned 100% of the corporations, they were the equivalent of his "right arm," with whom he could not "conspire." *See United States v. Computer Sciences Corp.*, 689 F. 2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). Such argument has no merit; the fact that Feltner owned 100% of the corporations' shares does not vitiate the fact that these corporations were separate legal entities. *See Feldman*, 853 F. 2d at 656 (stating, "[i]f one corporation possesses an existence separate from it incorporator, clearly a group of

corporations formed by defendant is also distinct"); *United States v. Benny*, 786 F. 2d 1410 (9th Cir.), *cert. denied*, 479 U.S. 1017 (1986); *McCullough v. Suter*, 757 F. 2d 142, 143-44 (7th Cir. 1985). Clearly, the jury had ample basis to find all defendants were collectively, the "enterprise."[4]

C. *The Existence of a RICO "Pattern"*

Appellants contend that their conduct did not amount to a "pattern of racketeering activity" required for RICO liability. 18 U.S.C. § 1962(c). The statute defines "pattern of racketeering activity" as "at least two acts of racketeering activity" occurring within a ten year period. 18 U.S.C. § 1961(5). Despite the language of the statute, the Supreme

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[4]We note that there is a split of authority as to whether the "enterprise" must have an "'ascertainable structure,' distinct from that inherent in the pattern of racketeering activity." *United States v. Bledsoe*, 674 F. 2d 647, 665 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982). Such a requirement of "ascertainable structure" has been adopted in *United States v. Tillett*, 763 F. 2d 628, 632 (4th Cir. 1985); *Bledsoe*, 674 F. 2d at 665; *United States v. Riccobene*, 709 F. 2d 214, 223-24 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983); it has been rejected in *United States v. Weinstein*, 762 F. 2d 1522, 1537 n.13 (11th Cir.), *modified* 778 F. 2d 673 (1985), *cert. denied* 475 U.S. 1110 (1986); and *United States v. Barganic*, 706 F. 2d 42, 55 (2d Cir.), *cert. denied sub nom.*, 464 U.S. 840, (1983).

Because appellant has failed to raise this as a basis for reversal we need not address this troublesome issue.

Court has stated that "while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.'" *Sedima*, 473 U.S. at 496 n.14. Instead, quoting legislative history, the Court observed that isolated incidents of "racketeering activity" do not implicate Congress' concerns about organized crime infiltrating legitimate business activity. Therefore, it repeated the language of the Senate Report stating "'[i]t is this factor of *continuity plus relationship* which combines to produce a pattern.'" *Id.* (emphasis added by Court).

The Supreme Court has heard argument on a case dealing with the "pattern" requirement and will perhaps provide additional guidance in the application of the "continuity plus relationship" test. *See H. J., Inc. v. Nothwestern Bell Telephone Co.*, 829 F. 2d 648 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1219 (1988).

In the meantime, however, we believe that the Third and Seventh Circuits have correctly ascertained the Court's inclinations regarding the "pattern" requirement. "In

determining whether the predicate acts are sufficiently continuous and related ... [the following factors are relevant]: the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries." *Liquid Air,* 834 F. 2d at 1304; *see Environmental Tectronics v. W. S. Kirkpatrick, Inc.,* 847 F. 2d 1052, 1063 (3d Cir. 1988)(stating, "a court should consider a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the characterof the unlawful activity"); *see also Sedima,* 473 U.S. at 496 n.14 (suggesting that courts define "pattern" with the language employed in *Liquid Air*).[5]

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[5]We also note that some circuits have adopted a literal, and extremely lenient, interpretation of the pattern requirement: two predicate acts in a related endeavor. *See United States v. Ianniello,* 808 F. 2d 184, 190 (2d Cir. 1986), *cert. denied sub nom.,* 107 S. Ct. 3229 (1987); *California Architectural Bldg. Products v. Franciscan Ceramics, Inc.,* 818 F. 2d 1466, 1469 (9th Cir. 1987), *cert. denied,* 108 S. Ct. 698 (1988).

We believe that appellants' conduct was of a magnitude sufficient to exhibit a "pattern of racketeering activity." The jury found that each defendant had committed wire and mail fraud (except Krypton which committed only mail fraud)-- 9 separate acts, each constituting a "racketeering activity." All 19 plaintiffs (excluding spouses) were alleged victims of mail fraud and wire fraud.[6] Two specified individuals, two corporations and Krypton were embroiled in this scheme. The acts occurred over a period of time; the solicitations began in October 1980; the sales occurred between November 1980 and early 1981; the contract envisioned a 10-year relationship between defendants and plaintiffs.[7] We conclude that these acts, even though arguably in furtherance of a single scheme to defraud a class of investors, constituted a sufficient "pattern of racketeering

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[6]*See, e.g., Calif. Architectural Bldg. Prods.*, 818 F. 2d at 1469 (where defendants made multiple fraudulent sales to multiple victims, activity was a "pattern"); *see also Bank of Amer.*, 782 F. 2d at 971 (pattern requirement satisfied when defendants prepared false reports which they knew would be mailed to victims).

[7]*See, e.g., Bank of Amer.*, 782 F. 2d at 971 (where acts of wire and mail fraud extended over three years, the pattern requirement was satisfied).

activity."[8]

We also reject any contention that a "pattern" requires "multiple schemes." *See H. J., Inc.* 829 F. 2d at 650; *Int'l Data Bank, Ltd. v. Sepkin,* 812 F. 2d 149 (4th Cir. 1987); *United States v. Ianniello,* 808 F. 2d 184, 192 (2d Cir. 1986); *cert. denied,* 107 S. Ct. 3229, 3230 (1987); *Bank of Amer. v. Touche Ross & Co.,* 782 F.2d 966, 971 (11th Cir. 1986); *Sun Sav. & Loan Ass'n v. Dierdorff,* 825 F. 2d 187 (9th Cir. 1987); *Calif. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.,* 818 F. 2d 1466, 1469 (9th Cir. 1987); *Barticheck v. Fidelity Union Bank/First Nat. State,* 832 F. 2d 36, 39 (3d Cir. 1987)(pattern need not involve more than one unlawful scheme). In *Hospital Employees' Division of Local 79 v. Mercy Memorial Hospital Corp.,* 862 F. 2d 606, 608-09 (6th Cir. 1988) and *Hofstetter v. Fletcher,* No. 87-3502, slip op. (6th Cir. Oct. 14, 1988), we have implicitly rejected a multiple scheme requirement.

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[8]*See, e.g., Barticheck v. Fidelity Union Bank/First Nat. State,* 832 F. 2d 36, 38 (3d Cir. 1987)(investment fraud scheme involving misrepresentations to 20 investors was "pattern" of racketeering activity); *United Energy Owners Comm., Inc. v. United Energy Mngmnt.,* 837 F. 2d 356 (9th Cir. 1988)(single scheme, involving multiple victims, to defraud through solar energy tax shelter program met pattern requirement).

We find that the scheme was significant enough to constitute a "pattern of racketeering activity," although we concede it is a close question.

D. *Liability of Krypton*

Krypton, in its motion for a directed verdict and j.n.o.v., claimed that it could not be liable because it was not yet incorporated during the existence of the alleged scheme. The district court denied the motions holding Krypton liable as "de facto" corporation.

RICO allows parties injured by RICO violations to recover from RICO violators, but only "persons" can violate RICO. 18 U.S.C. § 1962(c) and § 1964(c). "Person" is defined to include "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3).

Under the uncontested circumstances of this case, we hold Krypton to be entitled to a directed verdict. During all times relevant to the RICO violations, Krypton, as an entity, did not have the capacity to hold either legal or beneficial title to property It follows that Krypton could not violate RICO because it was not a legal "person."

Although a de facto corporation under Ohio law can hold property, under the facts here, a de facto corporation could not have existed. *See* 11 Ohio Jur. 3d, *Business Relationships* § 36 (1979)(stating, "a de facto corporation possesses all of the power and authority of a de jure corporation"). In order for a corporation to have a de facto status, however, three conditions must be fulfilled: (1) a general law under which a corporation may lawfully exist; (2) a good faith attempt to organize under the law and a colorable compliance with the statutory requirements; and (3) actual use or exercise of corporate privileges. *Read v. Tidewater Coal Exchange, Inc.*, 116 A. 898 (Del. Ch. 1922); *Society Perun v. Cleveland*, 3 N.E. 357 (Ohio 1885); Henn & Alexander, *Laws of Corporations* § 140 (3d ed. 1983); 11 Ohio Jur. 3d, *Business Relationships* § 40 (1979).

The record makes no indication that there was a good faith attempt to organize or to comply with the statutory requirements. The only evidence in the record was the two letters written on Krypton stationery and Feltner's remark that he thought he told his lawyer to incorporate Krypton. These efforts fall far short of any good faith attempt to incorporate. There is nothing else in the record to indicate

that Krypton was any kind of entity capable of holding legal or beneficial title to property.

Whatever Krypton was, it was a part of the enterprise, but it was not a "person" associated with such "enterprise." It cannot, then be held liable, although individuals who owned and/or operated this entity may have had liability.

III. DAMAGES

The defendants vigorously contend that the award of damages cannot stand because plaintiffs paid out, cumulatively, only $211,700 and yet were awarded nearly six times this total in actual damages. Plaintiffs simply assert that damages are not confined to the amount appellees paid in down payments, and that the purpose of the RICO statute is to punish offending defendants. Plaintiffs have failed to set out with particularity the tax adjustments and have offered little proof to indicate what reasonable return could be expected on their investment (if and when paid for).

Even if we accept the principle that RICO damages are designed to punish, we require plaintiffs in RICO cases to

set out a reasonable and principled basis for recovery. The effective means of punishing a defendant in the civil RICO context is to apply the treble multiplier to damages established by competent proof, not based upon mere speculation and surmise.

18 U.S.C. § 1964(c) states that "Any person injured in his business or property by reason of a violation of section 1962 of the chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." We begin our consideration of the damage award with reference to the statutory standard, which, we concede is not very enlightening.

The measure of damages under civil RICO has been described as the harm occasioned as a result of the predicate acts of the offenders. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985). A plaintiff injured by civil RICO violaltions deserves a "complete recovery." *Carter v. Berger*, 777 F. 2d 1183, 1176 (7th Cir. 1985); *see Liquid Air*, 834 F. 2d at 1310. Courts have interpreted this statute to mean that a plaintiff may recover only the "damages flowing directly from the predicate acts." *Volk v. D. A. Davidson &*

Co., 816 F. 2d 1406, 1415 (9th Cir. 1987); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F. 2d 384, 398 (7th Cir. 1984) *aff'd.* 473 U.S. 606 (1985); *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378, 1386 (N.D. Ind. 1984). Recovery for physical injury or mental suffering is not allowed under civil RICO because it is not an injury to business or property. *See e.g. Drake v. B. F. Goodrich*, 782 F. 2d 638, 644 (6th Cir. 1986).

As a general rule, RICO plaintiffs are entitled only to damages to busines or property proximately caused by the predicate acts. *See Haroco*, 473 U.S. at 609. Applying this rule to the circumstances of this case we believe that plaintiffs' damages should be limited to the amounts actually invested. Apellants indicate that plaintiffs collectively paid out to defendants only $211,700; plaintiffs do not challenge these computations.

Plaintiffs contend that the jury intended to award them expectancy or "benefit of the bargain" damages. Although in some cases expectancy damages might be appropriate, clearly they are not in this case. One district court case is especially illustrative of this point. In *Heinhold v. Perlstein*, 651 F. Supp. 1410 (E.D. Pa. 1987), the court dismissed a case

because the plaintiff failed to show how defendant's conduct caused him any injury. Plaintiffs similarly have failed here. The conduct of the defendants in the case at bar caused the parties to invest in the films but it did not cause the investment items to become less profitable than defendants represented. As in *Heinhold,* the fraud could not simultaneously induce plaintiffs to invest and reduce the value of the investment's object. There was ample warning about risks involved, particularly tax hazards, therefore, expectancy damages are not recoverable under these circumstances. In addition, there was no realistic evidence presented as to a reasonable value or estimate of lost profits or of the "bargain" based on analogy, experience, or practice.

Plaintiffs also contend that they are entitled to future tax benefits and penalties associated with the IRS actions against them. Once again, we cannot say that these expenses were caused by the illegal predicate acts. Appellants' fraudulent conduct was confined to representations of the value of the films sold to plaintiffs. Parties remain "free to arrange [their] financial affairs to minimize [their] tax liability," *Stranahan v. Commissioner,* 472 F. 2d 867, 869 (6th Cir. 1973), and plaintiffs were not

mislead about tax consequences, particularly, Donald Forrester, the C.P.A. The evidence unequivocally indicates that the plaintiffs were truthfully advised of the risks associated with the investment's tax treatment. This case is very different from *Hofstetter v. Fletcher*, No. 87-3502, slip op. (6th Cir. Oct. 14, 1988), in which the fraudulent acts were representations, which defendants knew were false, that plaintiffs could eliminate their federal tax liability by purchasing a life insurance policy in conjunction with the formation of a home-based business and deducting household expenses as business expenses.

During closing argument before the jury, plaintiffs asserted that they were entitled to damages for "everything they had to go through and are still going through" as a result ofthe alleged wrongdoing. To the extent that this was an invitation for physical injury or mental suffering, it was improper; these damages are not allowed under RICO because they are not injuries to business or property. *Drake v. B. F. Goodrich Co.*, 782 F. 2d 638, 644 (6th Cir. 1986).

After addressing the extent of plaintiffs' damages, appellants contend that damages should be reduced by the amount of tax benefits plaintiffs received. We disagree. In

Randall v. Loftgaarden, 478 U.S. 647 (1986), the Supreme Court held, in a securities case, that the rescissory recovery should not be reduced by tax benefits received from a tax shelter investment. The court articulated several reasons for its decision. First, tax benefits are not "income." The securities law at issue stated that the amount of recovery would be consideration paid less income received. *See id.* at 651-52, 658; 15 U.S.C. § 77*l*(2). This factor is not specially relevant in the RICO context. Second, however, at common law tax benefits were not a direct product of the security. *Randall*, 478 U.S. at 658. And third, the statute seeks rescission plus deterrence, therefore, denying defendants the benefit of offsetting tax benefits generated by their illegal offering is an appropriate result. *See also Freschi v. Grand Coal Venture*, 767 F. 2d 1041 (2d Cir. 1985); *vacated*, 106 S. Ct. 3325, *on remand*, 800 F. 2d 305, *reconsidered*, 806 F. 2d 17 (Supreme Court remanded to determine tax question in light of *Randall* and *Sedima*). Plaintiffs' award should not be reduced by tax benefits, if any, received.

Finally, the district court also erred in instructing the jury to award damages against each defendant separately and individually. Although there is little direct law on this

point, there are numerous RICO criminal forfeiture cases which indicate that the nature of the RICO offense mandates joint and several liability. *See United States v. Caporale,* 806 F. 2d 1487, 1506-09 (11th Cir. 1986), *cert. denied,* 482 U.S. 917 (1987); *United States v. Benevento,* 663 F. Supp. 1115, 1118-19 (S.D.N.Y. 1987), 836 F. 2d 129 (2d Cir. 1988); *see also Beneficial Standard Life Ins. Co. v. Madarriaga,* 851 F.2d 271, 272 (9th Cir. 1988) (civil RICO liability assessed jointly and severally); *cf., Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 638-46 (1981) (no right to contribution implied under Sherman or Clayton Act); *Northwest Airlines, Inc. v. Transport Workers,* 451 U.S. 77, 86-99 (1981) (no right to contribution implied under Equal Pay Act or Title VII); *Miller v. Affiliated Financial Corp.,* 624 F. Supp. 1003, 1004 (N.D. Ill. 1985) (contribution is not available as to RICO liability, relying on *Texas Industries* and *Northwest Airlines*). Defendants all participated in the "enterprise" responsible for the RICO violations; awarding damages separately between each plaintiff and defendant is inconsistent with the nature of the injury appellants inflicted and brings

about danger of multiplying damages before they are trebled.[9]

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[9]It is an interesting question as to whether the award to Fleischhauer should be reduced by the commissions he received. Upon reflection, we conclude that Fleischhauer may be compensated for the time he spent promoting the program on the theory that loss to his time was damage induced by defendants' conduct.

CONCLUSION

We **AFFIRM** the jury's verdict on all liability issues with the exception of Krypton. We **REVERSE** the judgment as to Krypton. We also **REVERSE** the damages determination; plaintiffs are entitled to damages, assessed jointly and severally against defendants, equal to their investment in the program, in the amount of $211,700. Based on RICO principles, this award will be trebled, the amounts to be allocated based on the schedule attached reflecting the total payments made by each plaintiff.

APPENDIX

Plaintiff// Transcript Testimony	Purchase Price/ Down Payment Due	Actual Down Payment Made	Tax Audit	Tax Treatment	Damage Awards(without trebling) (R.61) Damages Agsinst C. Elvin Feltner, Jr.	Damages Against Each of Other 4 Defendants (separately)	Total Damages Against All Defendants
1. Natividad Aumentado (Tr. 1096-1097) (stipulation)	$65,000/ $12,500	$6,000	yes	received benefits; after audit $3,578 in interest & penalties paid	$10,048	+ $2,512 x 4	= $20,096
2. Ken W. Chambers (Tr. 921-931)	65,000 12,500	5,000	yes	received benefits; audit pending	$26,929	+ 6,732 x 4	= 53,857
3. Gordon M. Earle (Tr. 199-253)	350.500/ 68,000	@35,000 (Tr. 233, 240)	yes	received benefits, total tax savings unknown (Tr. 241-245, 248); after audit approximately $35,000 owed (Tr. 212-215, 240)	43,166	+ 10,792 x 4	= 86,334
4. Harry E. Fleishhauer[1] (Tr. 628-697) (Tr. 840-869) (Tr. 873-921)	129,800[2] 8,600[3]	200 (Tr. 484)	yes	$38,998 in benefits received; after audit $26,000 tax, $25,000 interest, $3,000 penalty paid (Tr. 910, 919-20)	28,378	+ 7,094 x 4	= 56,754
5. Bruce I. Forrester (Tr. 942-989)	65,000/ 10,000 (Tr. 964)	1,500	yes	$50,00 in benefits received; after audit $50,000 in interest & penalties paid[4] (Tr. 965-966)	14,833	+ 3,708 x 4	= 29,665
6. Donald Forrester (Tr. 1048-1052) (Tr. 1064-1095)	162,500/ 2,500	-0-	yes	$97,500 in benefits received; audit pending with potential payment due $100,000	85,732	+ 21,433 x 4	= 171,464

7. Kathleen D. Forrester (Tr. 989-991)	130,000/ 20,000 (Tr. 964)	3,000	yes	see Bruce Forrester[4]	17,166	+ 4,291 x 4	= 34,330
8. Robert P. Gill (Tr. 1008-1015)	65,000/ 12,500	12,500	no	received benefits; in excess of $12,500 cash net profit (Tr. 1013-1014)	37,742	+ 9,436 x 4	= 75,486
9. Dennis M. Harrington (Tr. 991-998)	65,000/ 12,500	5,000	yes	received benefits; after audit $29,000 tax including $14,000 to $15,000 interest & penalties paid	14,488	+ 3,622 x 4	= 28,976
10. Roger Houston (Tr. 608-628)	130,000/ 25,000	25,000	yes	$42,000 in benefits received; after audit $34,000 taxes, interest & penalties	41,878	+ 10,469 x 4	= 83,754
11. Charles E. Judd dba C. B. Judd & Associates (Tr. 1098-1098) (stipulation)	65,000/ 10,000	5,000	no	received benefits	26,929	+ 6,732 x 4	= 53,857
12. C. T. Lee (Tr. 1099-1100) (stipulation)	65,000/ 12,500	12,500	yes	received benefits; after audit benefits disallowed	32,239	+ 8,060 x 4	= 64,479
13. Robert & Ona Louise Mournigham (Tr. 490-508) (Tr. 512-547)	97,450[2] / 18,750	6,000 (Tr. 523)	no	$20,000 in federal tax benefits received (Tr. 537)	28,394	+ 7,098 x 4	= 56,786

14. Charles Mueller (Tr. 931-942)	65,000/ 12,500	6,000	yes	received benefits; after audit $32,000 taxes, interest + penalties paid	24,259	+ 6,065 x 4	= 48,519
15. James Ralph (Tr. 547-585)	65,000/ 12,500	12,500	yes	$24,000 in benefits received; after auidit $24,000 tax, $19,200 interest, $1,000 penalty paid (Tr. 583-584)	39,904	+ 9,226 x 4	= 76,808
16. REF Productions Ltd. (Tr. 1015-1048)	200,000/ 50,000	35,000[5]	yes	received benefits; after audit $151,000 tax and $58,000 in interest + penalties paid to IRS & $13,662 KY tax[6]	82,747	+ 20,687 x 4	= 165,495
17. Joseph Reisinger (Tr. 585-608)	65,000/ 12,500	12,500	no	$15,000 in benefits received (in excess of payments) (Tr. 607)	36,904	+ 9,226 x 4	= 73,808
18. Louis B. Updegrove (Tr. 1052-1064)	45,550/ 8,750	4,000	no	received benefits in excess of $4,000	25,516	+ 6,379 x 4	= 51,032
19. Daniel E. & Carol Ann Wright (Tr. 998-1008) (Tr. 253-319)	130,000/ 25,000	25,000	yes	received benefits; after audit $46,000 paid to IRS of which $18,000 was interest (Tr. 293)	42,809	+ 10,702 x 4	= 85,617
TOTALS	$2,085,750 $346,600	$211,700	14 yes/no		$660,061	+ 164,264 x 4	=$1,317,117

FOOTNOTES

1. Received commissions on all sales to plaintiffs and others in the amount of $55,858 (JTX-62)(Tr. 1288)

2. Stipulation (Tr. 51)

3. Balance of $8200 to be paid through offset on commissions due (JTX-115)

4. Joint return filed in 1980 for Bruce Forrester and Kathleen Forrester per former (Tr. 964-965), and separate return per latter (Tr. 911)

5. Paid $25,000 by Charles Eppling and $10,000 by George Renker (nothing paid by REF or Donald Forrester)(Tr. 1036)

6. No tax paid by REF or by Donald Forrester as general partner Charles Eppling paid $106,668 and George Renker paid $113,114 to IRS

APPENDIX B

SUPPLEMENTAL OPINION

Issued August 31, 1989

In our original opinion in this case, we affirmed the jury's verdict on liability issues, with the exception of Krypton Corporation's liability which we reversed, and we reversed the damages determination finding that the evidence could not support the amount of damages the jury awarded. We held that in civil actions under the Racketeer Influenced Corrupt Organizations Act, a successful plaintiff is "entitled to damages to business or property proximately caused by the predicate acts," assessed jointly and severally. Under the evidence introduced at that trial, we concluded that the plaintiffs were entitled, for the most part, to recover the "amounts actually invested," subject to trebling. To assist the district court in modifying its judgment on remand, we attached to the opinion, as an Appendix, a chart summarizing the evidence presented relating to these amounts.

Appellees filed a motion for rehearing on July 11, 1989, to which this court requested a response from appellants. A

response was filed on July 28, 1989. Appellees asked the panel to reconsider some of the Appendix entries in light of information in the transcript not previously brought to the attention of the panel. Appellants conceded several of appellees' objections in their response.

In light of appellants' concessions and our evaluation of the other points raised in appellees' motion to reconsider, we amend the Appendix of the opinion to reflect the following payments several of the appellees made to Southwest Capital Corporation. The following appellees should be credited with having paid the amounts in parentheses following their names in addition to the amounts reflected in the Appendix: Bruce I. Forrester ($254); Dennis M. Harrington ($630); Roger Houston ($1,416); Charles Mueller ($600); Daniel E. & Carol Ann Wright ($410); and Joseph Reisinger ($210).

Appellees also contest the amount of down payments made by Bruce I. Forrester and Kathleen D. Forrester. The precise amounts of their down payments should be determined by the district court on remand.

In all other respects the Court's Opinion is AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NO. 87-4060

HARRY E. FLEISCHHAUER, *et al.*,
Plaintiffs-Appellees,

v.

C. ELVIN FELTNER, JR., *et al.*,
Defendants-Appellants.

FILED

JUN 27 1989

LEONARD GREEN, Clerk

Before; KRUPANSKY and WELLFORD, Circuit Judges;

and JOINER, Senior District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed in part and reversed in part.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

/s/ Leonard Green
Clerk

Issued as Mandate: September 25, 1989

COSTS None

Filing fee ..... $
Printing ..... $
Total ..... $

A True Copy

Attest:

/s/ Gary McCarthy
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NUMBER; C-1-84-0872

HARRY FLEISCHHAUER *ET AL.*

v.

ELVIN FELTNER, JR. *ET AL.*

JUDGMENT IN A CIVIL CASE

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED **that the jury award be TRIPLED. Further ORDERED that the plaintiffs are AWARDED their costs and reasonable attorney fees. Plaintiff's counsel is**

DIRECTED to submit to the Court within 30 days a statement seting forth in detail the legal services rendered and appropriate costs.

August 13, 1987
Date

Kenneth J. Murphy, Clerk
Clerk

/s/ Paul Hennessy
(By) Deputy Clerk

APPENDIX E

JURY QUESTIONS

A. RICO

1. Do you unanimously find that any defendant violated RICO as that term is defined in Instruction 6203?

Yes X No___

If you answered "Yes", proceed to question 2. If you answered "No", skip question 2, 3, 4 and 5 and answer question 6.

2. Did any defendant commit mail fraud as that term is defined in Instruction 6211?

Yes X No___

3. Did any defendant commit fraud by use of a communication device (wire fraud) as that term is defined in Instruction 6221?

Yes X No___

4. Identify the defendant(s) committing either mail fraud or wire fraud

	Mail Fraud Yes / No	Wire Fraud Yes / No
a. C. Elvin Feltner, Jr	X	X
b. Robert J. Levine	X	X
c. Palm Beach Properties Inc. a.k.a. Palm Beach Films Inc.	X	X
d. Metropolitan Properties Inc. a.k.a. Metropolitan Films Inc.	X	X

e. Kryton Corporation	X	X

7-28-87
Date

/S/ Mark Wiggershaus
Foreman

1. /S/ Mary Jane Schmuelling
2. /S/ Marie T. Argo
3. /S/ Nancy Thacker
4. /S/ Ann Schniederman
5. /S/ Michael D. Houk

5. Which Plaintiff(s) were affected either by mail fraud or wire fraud?

	Mail Fraud Yes / No	Wire Fraud Yes / No
a. Harry E. Fleischhauer	X	X
b. Louis B. Updegrove	X	X
c. Roger Houston	X	X
d. Bruce I. Forrester	X	X
e. Kathleen D. Forrester	X	X
f. Robert P. Gill	X	X
g. Daniel E. & Carol A. Wright	X	X
h. Gordon M. Earle	X	X
i. REF Productions Ltd.	X	X
j. Dennis M. Harrington	X	X
k. Charles Mueller	X	X

l. C. T. Lee	X	X
m. James Ralph	X	X
n. Natividad M. Aumentado	X	X
o. Donald Forrester	X	X
p. Robert & Ona L. Mournighan	X	X
q. Joseph Reisinger	X	X
r. Ken W. Chambers	X	X
s. Charles E. Judd d.b.a. C. B. Judd & Associates	X	X

7-28-87
Date

/S/ Mark Wiggershaus
Foreman

1. /S/ Mary Jane Schmuelling
2. /S/ Marie T. Argo
3. /S/ Nancy Thacker
4. /S/ Ann Schneiderman
5. /S/ Michael D. Houk

B. FRAUD UNDER OHIO LAW

6. Do you unanimously find that a defendant committed fraud under the laws of the Ohio as that term is defined in instruction 6602?

Yes ___ No X___

If you have answered "Yes", proceed to question 7. If you have answered "No", skip questions 7 and 8 and proceed to question 9.

7. Which defendant(s) committed such fraud?

	Yes / No
a. C. Elvin Feltner, Jr	
b. Robert J. Levine	
c. Palm Beach Properties Inc. a.k.a. Palm Beach Films Inc.	
d. Metropolitan Properties Inc. a.k.a. Metropolitan Films Inc.	
e. Kryton Corporation	

8. Which plaintiff(s) were affected by such fraud?

	Yes / No
a. Harry E. Fleischhauer	
b. Louis B. Updegrove	
c. Roger Houston	

d. Bruce I. Forrester

e. Kathleen D. Forrester

f. Robert P. Gill

7-28-87
Date

/S/ Mark Wiggershaus
Foreman

g. Daniel E. & Carol A. Wright

h. Gordon M. Earle

i. REF Productions Ltd.

j. Dennis M. Harrington

k. Charles Mueller

l. C. T. Lee

m. James Ralph

n. Natividad M. Aumentado

o. Donald Forrester

p. Robert & Ona L. Mournighan

q. Joseph Reisinger

r. Ken W. Chambers

s. Charles E. Judd d.b.a.
C. B. Judd & Associates

7-28-87
Date

/S/ Mark Wiggershaus
Foreman

1. /S/ Mary Jane Schmuelling
2. /S/ Marie T. Argo

3. /S/ Nancy Thacker
4. /S/ Ann Schneiderman
5. /S/ Michael D. Houk

C. COUNTERCLAIMS

11. Do you unanimously find that any plaintiff is obligated to pay the balance of the down payment on any contract?

Yes ___ No X___

If you answered "Yes" answer question 12. If you answered "No" skip question 12.

12. What amount of money is owed by a plaintiff to the defendants?

a. Harry E. Fleischhauer $_____

b. Louis B. Updegrove $_____

c. Roger Houston $_____

d. Bruce I. Forrester $_____

e. Kathleen D. Forrester $_____

f. Robert P. Gill $_____

g. Daniel E. & Carol A. Wright $_____

h. Gordon M. Earle $_____

i. REF Productions Ltd. $_____

j. Dennis M. Harrington $_____

k. Charles Mueller $_____

l. C. T. Lee $_____

m. James Ralph $_____

n. Natividad M. Aumentado $_____

o. Donald Forrester $_____

p. Robert & Ona L. Mournighan $_____

q. Joseph Reisinger $_____

r. Ken W. Chambers $_____

s. Charles E. Judd d.b.a.
C. B. Judd & Associates $_____

7-28-87
Date

/S/ Mark Wiggershaus
Foreman

1. /S/ Mary Jane Schmuelling
2. /S/ Marie T. Argo
3. /S/ Nancy Thacker
4. /S/ Ann Schneiderman
5. /S/ Michael D. Houk

Fleischhauer -v- Feltner

C-84-0872

FILED
KENNETH J. MURPHY, CLERK JUL 29 3:57 PM '87
UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO WESTERN DIVISION CINCINNATI

CHART A
RICO DAMAGES

	C. Elvin Feltner Jr.	Robert J. Levine	Palm Beach Properties, Inc. aka Palm Beach Films, Inc.	Metropolitan Properties, Inc. aka Metropolitan Films, Inc	Krypton Corporation
Harry E. Fleischhauer	$28,387.00	$ 7,094.00	$ 7,094.00	$ 7,094.00	$ 7,094.00
Louis B. Updegrove	$25,516.00	$ 6,379.00	$ 6,379.00	$ 6,379.00	$ 6,379.00
Roger Houston	$41,878.00	$10,469.00	$10,460.00	$10,469.00	$10,469.00
Bruce I. Forrester	$14,833.00	$ 3,708.00	$ 3,708.00	$ 3,708.00	$ 3,708.00
Kathleen D. Forrester	$17,166.00	$ 4,291.00	$ 4,291.00	$ 4,291.00	$ 4,291.00
Robert P. Gill	$37,742.00	$ 9,436.00	$ 9,436.00	$ 9,436.00	$ 9,436.00
Daniel E. & Carol Ann Wagner	$42,809.00	$10,702.00	$10,702.00	$10,702.00	$10,702.00
Gordon M. Earle	$43,166.00	$10,792.00	$10,792.00	$10,792.00	$10,792.00
REF Productions Ltd.	$82,747.00	$20,687.00	$20,687.00	$20,687.00	$20,687.00
Dennis M. Harrington	$14,488.00	$ 3,622.00	$ 3,622.00	$ 3,622.00	$ 3,622.00
Charles Mueller	$24,259.00	$ 6,065.00	$ 6,055.00	$ 6,055.00	$ 6,055.00
C. T. Lee	$32,239.00	$ 8,060.00	$ 8,060.00	$ 8,060.00	$ 8,060.00
James Ralph	$39,904.00	$ 9,226.00	$ 9,226.00	$ 9,226.00	$ 9,226.00
Natividad Aumentado	$10,048.00	$ 2,512.00	$ 2,512.00	$ 2,512.00	$ 2,512.00
Donald Forrester	$85,732.00	$21,433.00	$21,433.00	$21,433.00	$21,433.00
Robert & Ona Louise Mournigham	$28,394.00	$ 7,098.00	$ 7,098.00	$ 7,098.00	$ 7,098.00
Joseph Reisinger	$36,904.00	$ 9,226.00	$ 9,226.00	$ 9,226.00	$ 9,226.00
Ken Chambers	$26,929.00	$ 6,732.00	$ 6,732.00	$ 6,732.00	$ 6,732.00
Charles E. Judd d.b.a. C.B. Judd & Associates	$26,929.00	$ 6,732.00	$ 6,732.00	$ 6,732.00	$ 6,732.00

7-28-87
Date

/s/ Mark Wiggerhaus
Foreman

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Harry Fleischhauer, Et al.,

Plaintiffs,

v. Civil No. C-1-84-0872

Elvin Feltner, Jr., Et al.,

Defendants.

ORDER

This matter is before the Court upon consideration of the jury award attached hereto as Chart A. In accordance therewith and in accordance with 18 U.S.C. § 1964 the Court does order that each of such damages be and it is hereby tripled resulting in an award of damages in Chart B.

In addition to the foregoing, Plaintiffs are hereby awarded their costs and a reasonable attorney fee. Plaintiffs' counsel is directed to submit to the Court within thirty (30) days of the date of this Order a statement setting forth in detail the legal services rendered and the appropriate costs therefor.

IT IS SO ORDERED.

Carl B. Rubin, Chief Judge
United State District Court

Fleischhauer -v- Feltner

C-84-0872

FILED
KENNETH J. MURPHY, CLERK JUL 29 3:57 PM '87
UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO WESTERN DIVISION CINCINNATI

CHART A
RICO DAMAGES

	C. Elvin Feltner Jr.	Robert J. Levine	Palm Beach Properties, Inc. aka Palm Beach Films, Inc.	Metropolitan Properties, Inc. aka Metropolitan Films, Inc	Krypton Corporation
Harry E. Fleischhauer	$28,387.00	$ 7,094.00	$ 7,094.00	$ 7,094.00	$ 7,094.00
Louis B. Updegrove	$25,516.00	$ 6,379.00	$ 6,379.00	$ 6,379.00	$ 6,379.00
Roger Houston	$41,878.00	$10,469.00	$10,460.00	$10,469.00	$10,469.00
Bruce I. Forrester	$14,833.00	$ 3,708.00	$ 3,708.00	$ 3,708.00	$ 3,708.00
Kathleen D. Forrester	$17,166.00	$ 4,291.00	$ 4,291.00	$ 4,291.00	$ 4,291.00
Robert P. Gill	$37,742.00	$ 9,436.00	$ 9,436.00	$ 9,436.00	$ 9,436.00
Daniel E. & Carol Ann Wright	$42,809.00	$10,702.00	$10,702.00	$10,702.00	$10,702.00
Gordon M. Earle	$43,166.00	$10,792.00	$10,792.00	$10,792.00	$10,792.00
REF Productions Ltd.	$82,747.00	$20,687.00	$20,687.00	$20,687.00	$20,687.00
Dennis M. Harrington	$14,488.00	$ 3,622.00	$ 3,622.00	$ 3,622.00	$ 3,622.00
Charles Mueller	$24,259.00	$ 6,065.00	$ 6,055.00	$ 6,055.00	$ 6,055.00
C. T. Lee	$32,239.00	$ 8,060.00	$ 8,060.00	$ 8,060.00	$ 8,060.00
James Ralph	$39,904.00	$ 9,226.00	$ 9,226.00	$ 9,226.00	$ 9,226.00
Natividad Aumentado	$10,048.00	$ 2,512.00	$ 2,512.00	$ 2,512.00	$ 2,512.00
Donald Forrester	$85,732.00	$21,433.00	$21,433.00	$21,433.00	$21,433.00
Robert & Ona Louise Mournigham	$28,394.00	$ 7,098.00	$ 7,098.00	$ 7,098.00	$ 7,098.00
Joseph Reisinger	$36,904.00	$ 9,226.00	$ 9,226.00	$ 9,226.00	$ 9,226.00
Ken Chambers	$26,929.00	$ 6,732.00	$ 6,732.00	$ 6,732.00	$ 6,732.00
Charles E. Judd d.b.a. C.B. Judd & Associates	$26,929.00	$ 6,732.00	$ 6,732.00	$ 6,732.00	$ 6,732.00

7-28-87
Date

/s/ Mark Wiggerhaus
Foreman

CHART B
TREBLED DAMAGES

	C. Elvin Feltner Jr.	Robert J. Levine	Palm Beach Properties, Inc. aka Palm Beach Films, Inc.	Metropolitan Properties, Inc. aka Metropolitan Films, Inc	Krypton Corporation
Harry E. Fleischhauer	$ 85,134	$21,282	$21,282	$21,282	$21,282
Louis B. Updegrove	$ 76,548	$19,137	$19,137	$19,137	$19,137
Roger Houston	$125,634	$31,407	$31,407	$31,407	$31,407
Bruce I. Forrester	$ 44,499	$11,124	$11,124	$11,124	$11,124
Kathleen D. Forrester	$ 51,498	$12,873	$12,873	$12,873	$12,873
Robert P. Gill	$113,226	$28,308	$28,308	$28,308	$28,308
Daniel E. & Carol Ann Wright	$128,427	$32,106	$32,106	$32,106	$32,106
Gordon M. Earle	$129,498	$32,376	$32,376	$32,376	$32,376
REF Productions Ltd.	$248,241	$62,061	$62,061	$62,061	$62,061
Dennis M. Harrington	$ 43,464	$10,866	$10,866	$10,866	$10,866
Charles Mueller	$ 72,777	$18,195	$18,195	$18,195	$18,195
C. T. Lee	$ 96,717	$24,180	$24,180	$24,180	$24,180
James Ralph	$119,712	$27,678	$27,678	$27,678	$27,678
Natividad Aumentado	$ 30,144	$ 7,536	$ 7,536	$ 7,536	$ 7,536
Donald Forrester	$257,196	$64,299	$64,299	$64,299	$64,299
Robert & Ona Louise Mournigham	$ 85,182	$21,294	$21,294	$21,294	$21,294
Joseph Reisinger	$110,712	$27,678	$27,678	$27,678	$27,678
Ken Chambers	$ 80,787	$20,196	$20,196	$20,196	$20,196
Charles E. Judd d.b.a. C.B. Judd & Associates	$ 80,787	$20,196	$20,196	$20,196	$20,196

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87-4060

HARRY E. FLEISCHHAUER, *et al.*,
Plaintiffs-Appellees

v.

C. ELVIN FELTNER, JR., *et al.*,
Defendants-Appellants

FILED

NOV 16 1989

LEONARD GREEN, Clerk

Before: KRUPANSKY and WELLFORD; Circuit Judges; and DeMASCIO, * District Judge.

ORDER

Defendants-appellants have moved for entry of judgment on supplemental opinion in this case based on professed uncertainty as to when a final judgment herein may have been rendered in respect to an intended petition for certiorari to the United States Supreme Court. The slip opinion and judgment in this case was initially issued on June 27, 1989. There were then petitions by parties on both sides for rehearing and responses thereto. On August 31,

1989, the court issued a supplemental opinion with particular respect to plaintiffs' petition for rehearing. The supplemental opinion results in a larger award in favor of several plaintiffs and remanded for determination by the district court the amounts of certain payments made by two plaintiffs to certain defendants.

In order to seek clarification for the date from which a petition for certiorari may be filed, defendants seek a "subsequent judgment." This court believes that the date of modification of the original judgment (August 31, 1989), is the appropriate date upon which the parties should act for certiorari. It was intended as a final judgment in the cause.

We decline the motion to enter a further "subsequent judgment."

SO ORDERED this 16th day of November, 1989.

ENTERED BY ORDER OF
THE COURT

/s/ LEONARD GREEN,jb
Clerk